



CenturyLink™

1801 California Street, 10th Floor
Denver, Colorado 80202
Phone 303 992-2503
Facsimile 303 296-4576

Craig J. Brown
Associate General Counsel

REDACTED – FOR PUBLIC INSPECTION

Via Courier

May 7, 2012

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: *In the Matter of Petition of CenturyLink for Forbearance Pursuant to 47 U.S.C. §160(c) from Dominant Carrier and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, WC Docket No. 12-60 –
Reply Comments of CenturyLink

Dear Ms. Dortch:

Enclosed with this correspondence are the Reply Comments of CenturyLink, to be filed in the above-referenced proceeding.¹ The Reply Comments contain certain information in the text that is confidential; in addition, two documents produced by financial analysts, as Attachments 1 and 2 to the Reply Comments, are confidential in their entirety.

For the non-redacted version of the Reply Comments, each page, along with the cover pages for Attachments 1 and 2, pursuant to the Protective Order of March 22, 2012,² have been marked **“CONFIDENTIAL INFORMATION – SUBJECT TO PROTECTIVE ORDER IN WC DOCKET NO. 12-60 BEFORE THE FEDERAL COMMUNICATIONS COMMISSION – ADDITIONAL COPYING PROHIBITED.”** As such, CenturyLink requests that the non-redacted version of the Reply Comments and Attachments 1 and 2 be withheld from public inspection. CenturyLink also requests that no further copies be made of material marked as confidential.

¹ The Petition was publicly noticed on March 6, 2012 (DA 12-346). Due dates for Comments and Reply Comments were extended on March 22, 2012 (Order, DA 12-451).

² Protective Order (DA 12-454), released on March 22, 2012.

CenturyLink is submitting the non-redacted version of its Reply Comments and Attachments 1 and 2 pursuant to the Protective Order, consistent with the confidentiality request associated with its Petition for Forbearance, as filed on February 23, 2012, and under Commission rules 47 C.F.R. §§ 0.457 and 0.459. The confidential information included in these documents is competitively sensitive information and thus should not be available for public inspection, nor subject to further copying. Such information would not ordinarily be made available to the public (except that the analyst information in Attachments 1 and 2 would be available to the public for a fee). Release of the confidential information in the Reply Comments would have a substantial negative competitive impact on CenturyLink; likewise, release of the analyst information in Attachments 1 and 2 without charge would have a substantial negative financial impact on the vendors that produced this information. Accordingly the non-redacted information in question is appropriate for non-disclosure pursuant to the Protective Order and under sections 0.457(d) and 0.459 of the Commission's rules. Pursuant to 47 C.F.R. § 0.459(b), CenturyLink provided justification for the confidential treatment of this type of information in the Appendix associated with its Petition for Forbearance, which applies with equal relevance to its Reply Comments and the appended Attachments 1 and 2.

Because it was not feasible to separate out the confidential information, *see* 47 C.F.R. § 0.459(a), without destroying the integrated nature of the information presented in the Reply Comments, CenturyLink is also submitting today under separate cover, via the Commission's Electronic Comment Filing System (ECFS), a redacted version of the Reply Comments. The redacted version of the Reply Comments are marked "**REDACTED – FOR PUBLIC INSPECTION**," with the confidential information redacted. Attachments 1 and 2 have been omitted in their entirety in the redacted submission.

For the non-redacted version of the Reply Comments, pursuant to the Protective Order, CenturyLink is submitting to the Office of the Secretary one original hard copy, along with an extra copy to be stamped and returned to the courier. In addition, CenturyLink is providing via courier two hard copies, along with two copies on Compact Discs, of the non-redacted version, which includes the confidential information, to Jean Ann Collins of the Competition Policy Division of the Wireline Competition Bureau (Ms. Collins is also being provided a copy of the redacted version of the Reply Comments today via e-mail). As noted above, CenturyLink is filing the redacted version of the Reply Comments via ECFS. CenturyLink is also transmitting a copy of the redacted version of its Reply Comments via e-mail to the Competition Policy Division of the Wireline Competition Bureau (CPDcopies@fcc.gov) and the FCC's contractor, Best Copy and Printing, Inc. (fcc@bcpiweb.com).

This letter includes no confidential information and the text is the same in both the non-redacted and redacted versions except for the confidentiality markings.

Please contact me via the above contact information or Jeb Benedict in CenturyLink's Federal Relations office (202-429-3114) if you have any questions.

REDACTED – FOR PUBLIC INSPECTION

Ms. Marlene H. Dortch
May 7, 2012
Page 3

Sincerely,

/s/ Craig J. Brown

Enclosures

cc: Jean Ann Collins (via courier, two hard copies and two copies on CDs of non-redacted and via e-mail, one copy of redacted)
Competition Policy Division of Wireline Competition Bureau (via e-mail one copy of redacted)
Best Copy and Printing, Inc. (via e-mail one copy of redacted)

REDACTED – FOR PUBLIC INSPECTION

REDACTED – FOR PUBLIC INSPECTION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Petition of CenturyLink for Forbearance Pursuant)	WC Docket No. 12-60
to 47 U.S.C. § 160(c) from Dominant Carrier and)	
and Certain <i>Computer Inquiry</i> Requirements)	
on Enterprise Broadband Services)	

REPLY COMMENTS OF CENTURYLINK

John E. Benedict
1099 New York Avenue, N.W.
Suite 250
Washington, DC 20001
202-429-3114
john.e.benedict@centurylink.com

Craig J. Brown
1099 New York Avenue, N.W.
Suite 250
Washington, DC 20001
303-992-2503
craig.j.brown@centurylink.com

Attorney for
CENTURYLINK

May 7, 2012

TABLE OF CONTENTS

	Page
I. INTRODUCTION AND SUMMARY	1
II. THE REQUESTED RELIEF WILL ACCELERATE BROADBAND DEPLOYMENT AND COMPETITION, CONSISTENT WITH SECTION 706	6
III. CENTURYLINK’S PETITION SATISFIES THE STATUTORY FORBEARANCE CRITERIA UNDER ANY REASONABLE STANDARD	10
A. The “Traditional Market Power” Test Employed in the <i>Phoenix Forbearance Order</i> Does Not Apply in this Context.	10
B. Even Under a Traditional Market Power Test, CenturyLink Lacks Market Power With Respect to the Services in Question.	16
1. Product Market.	16
2. Geographic Market.	18
3. Market Power Analysis.	20
a. The Enterprise Broadband Marketplace Is “Highly Competitive.”	20
b. CenturyLink Is Not a “Dominant” Provider of Enterprise Broadband Services.	24
IV. THE REQUESTED FORBEARANCE EASILY SATISFIES EACH OF THE REQUIREMENTS OF SECTION 10	26
A. Section 10(a)(1) – Charges, Practices, Classifications, and Regulations.	27
B. Protection of Consumers.	29
C. Public Interest.	30
V. CONCLUSION	31

REDACTED – FOR PUBLIC INSPECTION

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Petition of CenturyLink for Forbearance Pursuant)	WC Docket No. 12-60
to 47 U.S.C. § 160(e) from Dominant Carrier and)	
and Certain <i>Computer Inquiry</i> Requirements)	
on Enterprise Broadband Services)	

REPLY COMMENTS OF CENTURYLINK

I. INTRODUCTION AND SUMMARY

CenturyLink's Petition seeks forbearance from dominant carrier regulation and the *Computer Inquiry* tariffing requirement with respect to CenturyLink's packet-switched and optical transmission services (hereinafter, "enterprise broadband services") that remain subject to these unnecessary obligations.¹

CenturyLink is a carrier consisting of several legacy incumbent LEC operations, including those of CenturyTel, Embarq and Qwest. Enterprise broadband services provided by CenturyLink's Qwest operations already are free from dominant carrier regulation, as are those of ACS, AT&T, BellSouth, Frontier and Verizon. The legacy Embarq operations have forbearance for some enterprise broadband services. The legacy CenturyTel operations today have no forbearance.² As long as key portions of its operations remain subject to these outdated

¹ CenturyLink Petition for Forbearance (filed Feb. 23, 2012), as resubmitted on March 21, 2012. CenturyLink seeks forbearance from both dominant carrier regulation and certain *Computer Inquiry* requirements that otherwise apply to the enterprise broadband services specified in the Petition. For simplicity, CenturyLink sometimes describes this request as seeking "nondominant treatment" for these services, which it intends to mean the full scope of the forbearance outlined in the Petition.

² Embarq's limited forbearance stems from the fact that the Commission limited forbearance solely to services currently offered, and not those in development. At the time it received forbearance, Embarq had only started rolling out its enterprise broadband services.

regulations, CenturyLink is artificially and unreasonably prevented from meeting customer demands and competing effectively in the enterprise broadband market.

The requested forbearance should be noncontroversial. It asks the Commission to grant CenturyLink the same forbearance for these services for each of its component operations, that is comparable to that applicable to far larger ILECs, and that will give CenturyLink the more uniform regulatory treatment necessary to compete with its many enterprise broadband competitors.

Forbearance will enable CenturyLink to respond quickly and creatively to competing offers for enterprise broadband services, and to meet customer demands for simple, individually tailored arrangements, in ways currently prevented by outdated dominant carrier regulation that oddly remains imposed on portions of CenturyLink's operations. By allowing CenturyLink to compete more effectively, and by eliminating its tariff as a pricing umbrella for competitors, forbearance also will help create further downward price pressure for these services. The requested relief therefore readily satisfies each of the statutory criteria for forbearance.

In addition to helping further promote competition in enterprise broadband services, granting the Petition also will help accomplish two other key goals of the Commission. *First*, it will help accelerate broadband deployment, competition and adoption, consistent with the objectives and mandate of section 706. Rapid deployment of fiber backhaul services to wireless cell sites is needed, in particular, to keep up with exploding demand for wireless broadband services. However, residual tariff obligations on CenturyLink needlessly delay and complicate the negotiation and implementation of arrangements to roll out these important new services, while hampering CenturyLink's ability to compete with other providers that can quickly offer the

REDACTED – FOR PUBLIC INSPECTION

simple, uniform arrangements that wireless providers and other customers seek. The requested relief will expedite CenturyLink's delivery of fiber backhaul services and strengthen its ability to compete, giving it a level playing field with competitors. In turn, having a more effective competitor in the enterprise broadband marketplace will help exert downward pricing pressure on fiber backhaul services and ultimately on the broadband services purchased by wireless consumers. More competition and lower prices for consumers promote broadband adoption.

Second, granting the Petition will advance the Commission's initiative to eliminate outmoded and excessively burdensome regulations, consistent with Executive Order 13579.³ The monopoly-era regulations in question are certainly obsolete. They are a particularly poor fit for the dynamic and evolving marketplace for enterprise broadband services. These regulations are not merely unnecessary, but also affirmatively harmful to customers' interests in obtaining high quality services on just, reasonable and nondiscriminatory rates, terms and conditions.

In response to the Commission's public notice,⁴ only three filings opposed the Petition.⁵ Two were from competitors,⁶ and the third represented a group that has always opposed

³ Executive Order 13579, *Regulation and Independent Regulatory Agencies*, 76 Fed. Reg. 41587 § 2 (July 14, 2011).

⁴ *Pleading Cycle Established for CenturyLink Petition for Forbearance from Dominant Carrier Regulation and Certain Computer Inquiry Requirements on Enterprise Broadband Services*, DA 12-346, WC Docket No. 12-60 (Mar. 6, 2012).

⁵ Another party supported the Petition. Corning recognizes that forbearance will enable greater investment in competitive enterprise broadband services.

⁶ Opposition of Sprint Nextel Corporation (filed Apr. 20, 2012) (Sprint); Opposition of tw telecom Inc. (filed Apr. 20, 2012) (tw telecom).

REDACTED – FOR PUBLIC INSPECTION

regulatory forbearance.⁷ Unable to argue against the merits of the Petition, Sprint and tw telecom fault CenturyLink for failing to satisfy an inapplicable standard. While the *Phoenix Forbearance Order* modified the Commission's analytical framework for evaluating certain types of forbearance petitions relating to legacy services and facilities, that framework does not properly apply here. When evaluating petitions for forbearance related to *broadband services*, the Commission has consistently and appropriately applied a more flexible analytical approach -- an approach upheld on appeal.

Moreover, the reams of highly disaggregated market data demanded by Sprint and tw telecom are unwarranted and unnecessary in this context. A simple evaluation reveals what the Commission has repeatedly found -- and what should be breathtakingly obvious: the enterprise broadband marketplace is "highly competitive" and CenturyLink is far from dominant in that marketplace. There are more than 30 national and regional providers of these services today, and CenturyLink has less than a ten percent share of revenues for these services. In Ethernet services, for example, CenturyLink is ranked only the sixth largest provider.⁸

⁷ Joint Comments and Opposition of the National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel (filed Apr. 20, 2012) (State Consumer Advocates).

⁸ Vertical Systems Group: *2011 U.S. Business Ethernet Leaderboard, Ethernet Port Base Rises 31% in 2011 on Solid Market Demand and More Competitive Service Pricing* (Feb. 13, 2012), available at http://www.verticalsystems.com/prarticles/stat-flash-02-2012-Year-End%202011_Leaderboard_prnews.html (website last visited May 1, 2012). tw telecom's claim that the Commission must maintain dominant carrier regulation of CenturyLink's Ethernet service is particularly ironic given that tw telecom is a larger provider of this service. *tw telecom Leads All Competitive Providers in Business Ethernet Services; Vertical Systems Group recognizes tw telecom as the 3d largest provider of Business Ethernet Ports in the United States; Continues market share leadership since 2006*, tw telecom Press Release (Feb. 14, 2012), available at <http://newsroom.twtelecom.com/index.php?s=24615&item=121588>.

REDACTED – FOR PUBLIC INSPECTION

It would be a significant departure from applicable precedent -- and, CenturyLink believes, arbitrary and capricious absent compelling justification⁹ -- to apply a traditional market power analysis to the Petition. Nevertheless, even if the Commission did so, the evidence in the record amply demonstrates that CenturyLink lacks market power for enterprise broadband services. Consistent with the Commission's analysis in its prior decisions, it is appropriate to analyze the extent of competition for enterprise broadband services as a group, and on a nationwide basis. Within this marketplace, CenturyLink plainly faces intense competition from other ILECs, traditional CLECs, cable companies, fiber providers and other carriers. In fact, despite some existing forbearance, CenturyLink is not a market share leader in any enterprise broadband services.

Similarly, NASUCA and the New Jersey Division of Rate Counsel, commenting jointly, repeat their historic opposition to any regulatory forbearance for ILECs. Ignoring market realities and all data provided in the Petition, they simply assert that "the industry" has market power and an "all-too-often captive subscriber/consumer base" to justify demanding that monopoly-era regulation be retained.¹⁰

The Petition's opponents thus wrongly insist that the Commission should ignore well established Commission precedents, including those that govern nearly all ILEC-provided

⁹ The Commission employed a flexible market analysis (rather than a traditional market power analysis) in eliminating dominant carrier regulation for the enterprise broadband services provided at that time by AT&T, ACS, Embarq, Frontier and Qwest. Petition at 5-6. It therefore would be arbitrary and capricious for the Commission to use a different analytical framework to evaluate this Petition without a "reasoned explanation" for its departure and consideration of any "facts and circumstances that underlay or were engendered by the prior policy." *FCC v. Fox TV Stations*, 129 S.Ct. 1800, 1811 (2009).

¹⁰ State Consumer Advocates at 4.

REDACTED – FOR PUBLIC INSPECTION

enterprise broadband services and those applicable to most of CenturyLink's operations today. As the Commission has found repeatedly, forbearance from the application of dominant carrier regulation to enterprise broadband services satisfies each of the three requirements for forbearance in section 10(a). The Commission should find the same here, and provide consumers with the benefits of increased broadband deployment, competition and adoption.

II. THE REQUESTED RELIEF WILL ACCELERATE BROADBAND DEPLOYMENT AND COMPETITION, CONSISTENT WITH SECTION 706

Over the past 15 years, pursuant to its statutory mandate, the Commission "has utilized forbearance from certain Title II regulations as one tool in its broadband strategy."¹¹ In the *Enterprise Broadband Forbearance Orders*, the Commission found that forbearance from dominant carrier regulation of the specified enterprise broadband services "will promote the public interest by furthering the deployment of advanced services," in a manner that is "entirely consistent with section 706 of the 1996 Act and Congress's express goals of 'promot[ing] competition and reduc[ing] regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.'"¹²

The Commission also found that forbearance in this context is consistent with section 7(a) of the Act, "which establishes a national policy of 'encourag[ing] the provision of new

¹¹ *Ad Hoc Telecomm'ns Users Committee v. FCC*, 572 F.3d 903, 907 (2009).

¹² See, e.g., *Petition of AT&T for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*; *Petition of BellSouth Corporation for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705, 18731 ¶ 47 (2007) (quoting 1996 Act Preamble, 110 Stat. at 56; 47 U.S.C. § 157 nt.) (*AT&T Title II and Computer Inquiry Forbearance Order*).

REDACTED – FOR PUBLIC INSPECTION

technologies and services to the public.”¹³ Regulating an ILEC on the same terms as its nondominant competitors, “encourage[s] all potential investors in broadband network platforms, and not just a particular group of investors, to be able to make market-based, rather than regulatory-driven, investment and deployment decisions.”¹⁴

Since deciding the *Enterprise Broadband Forbearance Orders*, the Commission’s elimination of dominant carrier regulation on most ILEC-provided enterprise broadband services “has contributed to increased fiber deployment throughout the United States and promoted competition in enterprise broadband services nationwide.”¹⁵ NASUCA and the New Jersey Rate Counsel wrongly claim that the quality of enterprise broadband services has declined since the Commission granted forbearance for most ILEC enterprise broadband services five years ago.¹⁶ On the contrary, there are “more flavors of Ethernet available today in the market as compared to three years ago, which provides business customers with more choices.”¹⁷ For its part, for example, CenturyLink’s Qwest operations have also offered innovative features not available

¹³ See, e.g., *id.* (quoting 47 U.S.C. § 157(a)).

¹⁴ See, e.g., *id.* at 18732 ¶ 49. In the *Section 271 Broadband Forbearance Order*, the Commission used forbearance to further the goals of section 706 by eliminating the requirements of section 271 for the broadband elements for which it had granted unbundling relief under section 251. *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*; *SBC Communications Inc.’s Petition for Forbearance Under 47 U.S.C. § 160(c)*; *Qwest Communications International Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*; *BellSouth Telecommunications, Inc. Petition for Forbearance Under 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496, 21512 ¶ 34 (2004) (*Section 271 Broadband Forbearance Order*), *aff’d*, *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006) (*EarthLink v. FCC*).

¹⁵ Corning at 2.

¹⁶ State Consumer Advocates at 2.

¹⁷ Roopashree Hannachari, Frost & Sullivan, *Demystifying Carrier Ethernet Services: No One Size Fits All*, BCS 5-02, at 1 (Apr. 6, 2011), appended to Petition as Attachment C.

REDACTED – FOR PUBLIC INSPECTION

when the services were tariffed, such as improved reliability, enhanced service level agreements (SLAs) and new network configurations. In the competitive market for enterprise broadband in general, customers enjoy more product choices and quality options than ever before. The Petition seeks to ensure that CenturyLink can give these customers the tailored options they want, just as its competitors can.

These demands are most acute for fiber backhaul services. Over the past few years, there has been a dramatic increase in the backhaul needs for wireless networks, due to the transition from narrowband, voice services to bandwidth-consuming data applications.¹⁸ As Corning notes, in supporting forbearance, “exploding demand for high-capacity services has caused enterprise customers, particularly wireless carriers, to move away from legacy time division multiplex (“TDM”) services like DS1s and DS3s to fiber-based Ethernet services.”¹⁹ Wireless providers recently have issued RFPs to purchase high-capacity backhaul services to a large percentage of their cell sites. Typically these RFPs request uniform rates, terms and conditions for each variant of Ethernet service.²⁰

Particularly with the combination of legacy CenturyTel, Embarq and Qwest, CenturyLink is well positioned to meet this growing demand for enterprise broadband services in large parts of the country, including many rural areas. However, lingering dominant carrier regulation prevents CenturyLink from offering the simple, uniform terms demanded in wireless providers’

¹⁸ See Petition at 27.

¹⁹ Corning at 2. See also Insight Research Corporation, *Carriers and Ethernet Services: Public Ethernet in Metro and Wire Area Networks 2011-2016*, at 7 (Aug. 2011) (noting that wireless providers are in the midst of a “large-scale ‘mass migration’ of wireless backhaul from TDM to Ethernet” services), appended to Petition as Attachment K.

²⁰ Binder Declaration ¶ 2, appended to Petition as Attachment D.

REDACTED – FOR PUBLIC INSPECTION

RFPs. In some cases, this liability has caused some wireless providers to walk away from CenturyLink proposals.²¹ When wireless providers have chosen CenturyLink as a broadband backhaul provider, the parties have had to negotiate needlessly complicated arrangements that attempt to simulate the simple, uniform arrangements contemplated in the RFPs²² -- arrangements that can readily be offered by all of CenturyLink's competitors, including companies far larger than CenturyLink. The results are frustration and sometimes pointless delays in deploying these broadband services or in augmenting capacity where it is desperately needed.

The requested forbearance would enable CenturyLink to meet these demands for broadband service, strengthening the company's ability to compete in an already intense market.²³ The "downward pricing pressures"²⁴ created by this competition ultimately will accrue to the benefit of all wireless broadband users, in the form of lower prices, which, in turn, will help spur increased adoption of wireless broadband services -- a key goal in the National Broadband Plan.²⁵ In these ways, the requested relief would further the goals of section 706 by facilitating broadband deployment and competition.²⁶

²¹ *Id.* ¶ 19.

²² Petition at 35-36.

²³ *See* Corning at 2.

²⁴ Frost & Sullivan, *U.S. Mobile Backhaul Services Market: Wireless Service Provider Spending Trends*, BCS5-8, at 6, appended to Petition as Attachment L.

²⁵ National Broadband Plan at 5.

²⁶ Corning at 3.

REDACTED – FOR PUBLIC INSPECTION

III. CENTURYLINK'S PETITION SATISFIES THE STATUTORY FORBEARANCE CRITERIA UNDER ANY REASONABLE STANDARD

While the *Phoenix Forbearance Order* altered the analytical framework for evaluating certain types of forbearance petitions, that policy shift had no effect on the Commission's long-standing practice of employing a more streamlined analysis of competitive conditions for broadband services. Nor should it, as "traditional market power" analysis as used in the *Phoenix Forbearance Order* is wholly inappropriate for the present Petition. Nevertheless, even under a traditional market power test, the record reveals that CenturyLink lacks market power for enterprise broadband services.

A. The "Traditional Market Power" Test Employed in the *Phoenix Forbearance Order* Does Not Apply in this Context.

In the *Phoenix Forbearance Order*, the Commission applied a "traditional market power" test to evaluate Qwest's request for forbearance from section 251(c)(3) unbundling obligations in Phoenix. This marked an abrupt (and, in CenturyLink's view, unwarranted) departure from the analysis the Commission had used in the *Omaha Forbearance Order* when evaluating a similar request. However, the *Phoenix Forbearance Order* did not alter the analytical framework that the Commission has repeatedly applied in evaluating petitions, such as this, seeking forbearance for *broadband services*. Indeed, the Commission expressly recognized in the *Phoenix Forbearance Order* that "a different analysis may apply when the Commission addresses

REDACTED – FOR PUBLIC INSPECTION

advanced services, like broadband services, instead of a petition addressing legacy facilities,” given the evolving nature of advanced services and the directives of section 706.²⁷

The Commission concluded in the *Phoenix Forbearance Order* that a “traditional market power analysis” was preferable to the analytical framework established in the *Omaha Forbearance Order* for evaluating requests for forbearance from section 251(c) unbundling obligations.²⁸ The Commission’s primary concerns in this regard have no relevance here: whether Qwest’s retail market share for telephone subscribers and the geographic reach of the incumbent cable company’s network were appropriate triggers for eliminating unbundling obligations;²⁹ whether a perceived duopoly constitutes effective competition sufficient to justify such elimination;³⁰ and whether the Commission’s predictive judgments in the *Omaha Forbearance Order* had been borne out by subsequent developments.³¹ Based on its evaluation of these concerns, the Commission concluded that “a more comprehensive analytical framework . . . is better suited to analyzing claims that competition in the legacy services market is sufficient to satisfy the three-part section 10 forbearance criteria, not only with respect to dominant carrier

²⁷ *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622, 8644-45 ¶ 39 (2010) (*Phoenix Forbearance Order*).

²⁸ *Id.* at 8632-33 ¶ 21, 8634 ¶ 25. In contrast, in evaluating Qwest’s request for forbearance from dominant carrier regulation, the *Omaha Forbearance Order* applied the same “traditional market power analysis” that was used in the *Phoenix Forbearance Order* and established in the *Competitive Carrier* proceeding. See *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19424-38 ¶¶ 15-50 (*Omaha Forbearance Order*).

²⁹ *Phoenix Forbearance Order*, 25 FCC Rcd at 8634-35 ¶¶ 27-28.

³⁰ *Id.* at 8635-39 ¶¶ 29-32.

³¹ *Id.* at 8639-42 ¶¶ 33-36.

REDACTED – FOR PUBLIC INSPECTION

regulation, but also with respect to the other regulatory obligations at issue here, such as section 251(c)(3) unbundling.”³²

In the *Enterprise Broadband Forbearance Orders*, the Commission applied the “different analysis” referred to in the *Phoenix Forbearance Order* in forbearing from dominant carrier regulation for the enterprise broadband services provided at that time by AT&T, ACS, Embarq, Frontier and Qwest. While the analysis in those orders was “informed by” the Commission’s traditional market power framework,³³ the Commission considered marketplace conditions “broadly,”³⁴ without regard to “specific, identified geographic markets.” It did so, it explained, because the market for enterprise broadband services is “emerging and changing,”³⁵ unlike the

³² *Id.* at 8642 ¶ 37 (emphasis supplied). Thus, the *Phoenix Forbearance Order* modified the Commission’s analytic framework only for evaluating competition in the “legacy services market.” *Id.* Because Qwest’s enterprise broadband services were already free from dominant carrier regulation, the *Phoenix Forbearance Order* dealt only with the TDM services provided by Qwest in Phoenix. The Commission therefore found no “persuasive claims that the requested forbearance from unbundling legacy network elements would advance the goals of section 706.” *Id.* at 8644 ¶ 39. Indeed, the Commission confirmed two paragraphs later that “a different analysis may apply when the Commission addresses advanced services, like broadband services, instead of a petition addressing legacy facilities, such as Qwest’s petition in this proceeding.” *Id.*; see also *id.* at 8646-47 ¶ 42 and n. 143. When evaluating a petition for forbearance related to advanced services, the Commission must consider both section 706’s directive to encourage deployment of advanced services and the way in which broadband services “continue[] to evolve and develop.” *Id.*

³³ See, e.g., *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements; Petition of the Frontier and Citizens ILECs for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 19478, 19489-90 ¶ 19 n.72 (*Embarq Title II and Computer Inquiry Forbearance Order*).

³⁴ See, e.g., *id.* ¶ 19.

³⁵ See, e.g., *id.* The Commission concluded that relying on specific geographic markets “would force the Commission to premise findings on limited and static data that failed to account for all of the forces that influence the future market development.” *Id.*

REDACTED – FOR PUBLIC INSPECTION

market for the legacy TDM services addressed in the *Phoenix Forbearance Order*. The Commission's approach in the *Enterprise Broadband Forbearance Orders* also rested on the Commission's acknowledgment that "many enterprise customers that purchase these types of services have national, multi-location operations and thus seek the best-priced alternatives from multiple potential providers having national market presences,"³⁶ another distinguishing feature from the *Phoenix Forbearance Order*.³⁷

In the *Enterprise Broadband Forbearance Orders*, the Commission also concluded that it should not give much weight to static market share information, given the "emerging and evolving nature" of the enterprise broadband marketplace.³⁸ Instead, it decided to "look more broadly at competitive trends without regard to specific geographic markets."³⁹ It is widely understood that market shares for an industry segment characterized by innovation and changing technology may not be meaningful predictors of future competitive conditions.⁴⁰ In such cases, a

³⁶ See, e.g., *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18718 ¶ 21. The Commission's observation is consistent with CenturyLink's experience in providing enterprise broadband services. See Petition at 18-19.

³⁷ On appeal of the *Enterprise Broadband Forbearance Orders*, it was argued that the Commission had "examined the wrong product market and wrong geographic market when it analyzed competition in *broadband services nationwide*, rather than focusing more precisely on *special access lines in identified local markets*." *Ad Hoc*, 572 F.3d at 908. However, the court found that petitioners' focus "on the narrowest possible market" was unavailing. *Id.*

³⁸ See, e.g., *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18719-20 ¶ 23.

³⁹ See, e.g., *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19489-90 ¶ 19.

⁴⁰ *Phoenix Forbearance Order*, 25 FCC Rcd at 8644 ¶ 39. *DOJ/FTC Guidelines* § 5.2 ("recent or ongoing changes in market conditions may indicate that the current market share of a particular firm either understate or overstates the firm's future competitive significance.");

REDACTED – FOR PUBLIC INSPECTION

firm's market position today "may say little about the firm's prospects one, two or five years from now, and the greater the level and rate of innovation in an industry, the less reliable a predictor of future events market share becomes."⁴¹

That is certainly true in telecommunications markets today, as skyrocketing bandwidth demands drive customers to migrate to higher capacity broadband services.⁴² According to Atlantic-ACM, for example, wireless carriers' spending on "OCx and above" (including Ethernet) has grown from one-third to two-thirds of their overall spending on local transport in just the past three years.⁴³ Carriers' methods of providing enterprise broadband services are fast evolving as well. For example, CLECs are quickly rolling out Ethernet-over-copper services in numerous areas served by CenturyLink, including some "Tier 2" and "Tier 3" cities.⁴⁴ Because these services are provisioned over unbundled loops, the CLECs' cost structure is typically much lower than for fiber-based ILEC broadband services, allowing them quickly to gain market share from ILECs.⁴⁵

Michael L. Katz and Howard A. Shelanski, *Mergers and Innovation*, 74 Antitrust L.J. 1, 14-15 (2007).

⁴¹ *Id.*

⁴² See Nav Chandler, IDC, *U.S. Carrier Ethernet Services 2011-2015 Forecast*, IDC #231257, at 1 (Nov. 2011), appended to Petition as Attachment J.

⁴³ Atlantic-ACM, *Wireless Backhaul: Sustaining Ethernet Growth in the Coming Years* at 10, available at <http://www.atlantic-acm.com/images/stories/whitepapers/aacmbackhaul2012.pdf> (2012).

⁴⁴ Petition at 23, Declaration of Ryan Schwertner ¶ 3, appended to Petition as Attachment F (Schwertner Declaration).

⁴⁵ Schwertner Declaration ¶ 5.

REDACTED – FOR PUBLIC INSPECTION

The dynamic broadband services marketplace earlier led the Commission to apply a similar approach in the *Section 271 Broadband Forbearance Order*. There, the Commission forbore from enforcing the requirements of section 271, on a national basis, with respect to the broadband elements no longer required to be unbundled under section 251.⁴⁶ On appeal, EarthLink faulted the Commission for failing to undertake “‘painstaking analysis of market conditions’ in ‘particular geographic markets and for specific telecommunications services.’”⁴⁷ EarthLink further contended that “‘competition’ can only rationally be assessed by focusing on more specific product and geographic markets and by conducting a ‘traditional market analysis (including market share, demand and supply elasticity, and other factors).’”⁴⁸ The D.C. Circuit disagreed. It found that, “[w]hile such an analysis is no doubt appropriate in some circumstances,” it could not say that the FCC was unreasonable “in taking another tack here, tailoring the forbearance inquiry to the situation at hand.”⁴⁹ The court noted that, given the Commission’s view of the broadband market “as still emerging and developing, it reasonably eschewed a more elaborate snapshot of the current market” in deciding whether to forbear in that context.⁵⁰

⁴⁶ *Section 271 Broadband Forbearance Order*, 19 FCC Rcd at 21502 ¶ 12.

⁴⁷ *EarthLink v. FCC*, 462 F.3d at 8.

⁴⁸ *Id.* at 9.

⁴⁹ *Id.*

⁵⁰ *Id.* Outside the context of forbearance petitions, the Commission also has repeatedly and consistently analyzed the evolving marketplace for broadband services at the national level. *See* Petition at 17-18 (noting the Commission’s analysis on a nationwide basis in the *Cable Modem Order*, *Wireline Broadband Order* and *Triennial Review Order*). All of these decisions were upheld on appeal. *Id.*

REDACTED – FOR PUBLIC INSPECTION

Given this history, Sprint and tw telecom are plain wrong when they suggest that the *Enterprise Broadband Orders* represent an “anomaly” in the Commission’s approach to analyzing market power issues.⁵¹ As the Commission noted in the *Forbearance Procedures Order*, because “the arguments and scope of the relief sought . . . vary widely from petition to petition, the adequate granularity of data may likewise vary.” Therefore, it must “judge on a case-by-case basis whether or not a petition for forbearance requires supporting data at, for example, the wire center level.”⁵² Here there is no need for the traditional market power analysis advocated by Sprint and tw telecom. The *Enterprise Broadband Orders* remain the directly applicable, appropriate precedent.

B. Even Under a Traditional Market Power Test, CenturyLink Lacks Market Power With Respect to the Services in Question.

Even if one were to evaluate the Petition through a traditional market power test, the result would be a finding that CenturyLink lacks market power.

1. Product Market.

Sprint and tw telecom claim that the Commission must separately evaluate competition for distinct enterprise broadband services purchased by retail and wholesale customers.⁵³ However, such a granular analysis is both unnecessary and inconsistent with applicable precedent.

⁵¹ Sprint at 3. Indeed, Sprint, tw telecom and NASUCA/New Jersey Rate Counsel are all simply re-arguing against enterprise forbearance already properly granted.

⁵² *Petition to Establish Procedural Requirements to Govern Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, Report and Order, 24 FCC Rcd 9543, 9559-60 ¶ 30 (2009) (*Forbearance Procedures Order*).

⁵³ Sprint at 5; tw telecom at 6.

REDACTED – FOR PUBLIC INSPECTION

Even aside from the *Enterprise Broadband Forbearance Orders*, the Commission has aggregated high capacity services for competitive analysis on a number of other occasions. For example, in the *SBC/AT&T Order*, the Commission declined to analyze separate product markets for different capacities of special access services. It found that there were “comparable competitive alternatives for varying capacities of special access services,” and that competing carriers’ “facilities can be ‘channelized’ to provide service at all capacity levels.”⁵⁴ In other words, enterprise broadband services are highly substitutable from a supplier’s perspective. Once the provider has deployed fiber to a location, it is relatively easy to transition among enterprise broadband services, by switching network electronics. Similarly, customers view these services as substitutable, as growing demand and technological innovation cause legacy services to be supplanted by newer services, such as IP, Ethernet and MPLS-based broadband services.⁵⁵

There also is no reason to believe that CenturyLink’s position in the enterprise broadband marketplace is materially different with respect to any of the individual services covered by the Petition, or for enterprise broadband services sold to wholesale, rather than retail, customers.⁵⁶ For all of these services, CenturyLink is just one of numerous national providers, and accounts

⁵⁴ *SBC Communications Inc. and AT&T Corp. Applications for Approval for Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18290, 18306 ¶ 27 n. 90 (2005) (*SBC/AT&T Order*). *Accord Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd 18433, 18448-49 ¶ 27 n. 89 (2005) (*Verizon/MCI Order*).

⁵⁵ See *Demystifying Carrier Ethernet Services: No One Size Fits All* at 1, appended as Attachment C to Petition.

⁵⁶ Petition at 15-16.

REDACTED – FOR PUBLIC INSPECTION

for a small fraction of total revenues. Moreover, CenturyLink's competitors also generally offer enterprise broadband services to wholesale, as well as retail, customers.⁵⁷

2. Geographic Market.

Sprint also disputes the use of a "national market" for enterprise broadband services,⁵⁸ despite the Commission's repeated use of that approach in the past. While the Commission has found that each customer location could constitute a separate relevant geographic market, it never undertakes such a detailed analysis. For reasons of administrative convenience, it traditionally aggregates customers facing similar competitive choices,⁵⁹ and then sometimes evaluates even broader areas, depending upon the particular facts and circumstances.⁶⁰ In the *Verizon/MCI Order*, for example, the Commission considered the potential effect of the proposed merger on Verizon's special access prices. Because Verizon had Phase II pricing flexibility for its special access services in some, but not all, MSAs, the Commission concluded

⁵⁷ See, e.g., AT&T website, available at <http://www.business.att.com/wholesale/Service/data-networking-wholesale/metro-services-wholesale/ethernet-services-wholesale/>; Verizon website, <http://www22.verizon.com/wholesale/solutions/category/Ethernet%2BSolutions.html>; tw telecom website, available at <http://www.twtelecom.com/telecom-solutions/wholesale-ethernet/>; Level 3 website, <http://www.level3.com/en/solutions/industry/wholesale/voice-service-providers/>; *Cox Business Enhances Ethernet Wholesale Capabilities through CENX Exchange*, Fierce Telecom (Oct. 1, 2010), available at <http://www.fiercetelecom.com/story/cox-business-enhances-ethernet-wholesale-capabilities-through-cenx-exchange/2010-10-01>; XO website, available at <http://www.xo.com/services/carrier/transport/Pages/ethernet.aspx> (websites last visited Apr. 30, 2012).

⁵⁸ Sprint at 7.

⁵⁹ See *Phoenix Forbearance Order*, 25 FCC Rcd at 8657 ¶ 64; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19489-90 ¶ 19 n. 72.

⁶⁰ See *Phoenix Forbearance Order*, 25 FCC Rcd at 8657 ¶ 65.

REDACTED – FOR PUBLIC INSPECTION

that Verizon's special access rates might vary from MSA to MSA and therefore evaluated on an MSA basis how the merger would likely affect Verizon's special access prices.⁶¹

The Commission has analyzed competition at the wire-center level for some TDM-based services,⁶² but it generally has found no need to go beyond the national level for higher capacity services.⁶³ For the services in question here, providers generally set prices on a nationwide basis, because purchasers typically seek services for their national, multi-location operations on uniform rates, terms and conditions.⁶⁴ In CenturyLink's experience, purchasers of enterprise broadband services generally demand uniform rates in urban and rural areas. Responding to these competitive pressures, CenturyLink has attempted to provide them, to the extent it has regulatory authority to do so.

⁶¹ *Verizon/MCI Order*, 20 FCC Rcd at 18450 ¶ 29.

⁶² See, e.g., *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 20 FCC Rcd 2533, 2634 ¶ 183 (2005) (*Triennial Review Remand Order*) (subsequent history omitted).

⁶³ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17168 ¶ 315, 17221 ¶ 389 (2003) (*Triennial Review Order*) (subsequent history omitted).

⁶⁴ Binder Declaration ¶ 2; *Embarq Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 19490-91 ¶ 20 ("many enterprise customers that purchase these types of services have national, multi-location operations and thus seek the best-priced alternatives from multiple potential providers having national market presences").

REDACTED – FOR PUBLIC INSPECTION

3. Market Power Analysis.

a. The Enterprise Broadband Marketplace Is “Highly Competitive.”

Five years ago, the Commission concluded that the marketplace for enterprise broadband services appears to be “highly competitive.”⁶⁵ Since that time, the market has grown even more crowded, with more than 30 providers offering enterprise broadband services nationally or to large areas of the country.⁶⁶ For cell site backhaul services, in particular, where much of the growing demand for enterprise broadband services is concentrated, CenturyLink faces intense competition from CLECs, cable companies and fiber wholesalers.⁶⁷

In almost all instances, such services require the construction of new fiber optic facilities. tw telecom’s assertion (at 9) that ILECs possess significant advantages in new build situations is plainly illogical. It conflicts with the Commission’s conclusion nearly a decade ago that ILECs and CLECs stand in the same position with respect to newly constructed facilities.⁶⁸ tw

⁶⁵ *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18718 ¶ 21, 18718-19 ¶ 22, 18719-20 ¶ 23.

⁶⁶ See Petition at 21, Attachment E.

⁶⁷ Petition at 27.

⁶⁸ *Triennial Review Order*, 18 FCC Rcd 17143 ¶ 275 (eliminating unbundling obligations for “greenfield” fiber-to-the-home facilities); *Triennial Review FTTC Reconsideration Order*, 19 FCC Rcd 20293 ¶ 1 (2004) (applying same rule for fiber-to-the-curb facilities). CenturyLink goes through a similar case-by-case analysis as that employed by tw telecom to determine whether constructing facilities to a particular customer location is economically feasible. See also *Triennial Review Reconsideration Order*, 20 FCC Rcd at 2616 ¶ 150 (“The economics of deploying loops are determined by the costs associated with such deployment and the potential revenues that can be recouped from a particular customer location.”).

REDACTED – FOR PUBLIC INSPECTION

telecom's claim is further belied by the fact that three CLECs (including tw telecom itself) are ranked well ahead of CenturyLink in market share for U.S. Business Ethernet services.⁶⁹

None of the factors cited by tw telecom could give CenturyLink any material competitive advantage over its competitors where it is necessary to deploy a fiber loop to provide the requested service -- even where CenturyLink has copper facilities in place. To replace copper with fiber, CenturyLink must do what any competitive provider must do: it must hire work crews to lay new conduit and fiber. Even where existing conduit can be used to deploy new fiber, CenturyLink's competitors can use that same conduit on regulated terms pursuant to section 224.⁷⁰ CenturyLink's legacy network infrastructure also does not give the company a significant advantage in winning this business. Many cable companies have just as much network

⁶⁹ Vertical Systems Group: *2011 U.S. Business Ethernet LEADERBOARD, Ethernet port base rises 31% in 2011 on solid market demand and more competitive service pricing* (Feb. 13, 2012), available at http://www.verticalsystems.com/prarticles/stat-flash-02-2012-Year-End%202011_Leaderboard_prnews.html (ranking tw telecom, Cox and XO the third, fourth and fifth largest providers of U.S. business Ethernet services, ahead of CenturyLink) (website last visited Apr. 26, 2012).

⁷⁰ See 47 U.S.C. § 224; 47 C.F.R. § 1.1403; *Triennial Review Reconsideration Order*, 20 FCC Rcd at 2616 ¶ 150 n. 419 (finding that "existing conduit is frequently available for use by competitive LECs that wish to deploy their own fiber"). ILECs similarly have no advantage with regard to building access, as the Commission has prohibited all carriers from entering into contracts that restrict or effectively restrict owners and managers of commercial multiple tenant environments (MTE) from permitting access by competing carriers. See *Promotion of Competitive Networks in Local Telecommunications Markets*, First Report and Order and Further Notice of Proposed Rulemaking, in WT Docket No. 99-217, Fifth Report and Order and Memorandum Opinion and Order in CC Docket No. 96-9, Fourth Report and Order and Memorandum Opinion and Order in CC Docket No. 88-57, 15 FCC Rcd 22983 (2001). In 2008, the Commission extended this rule to residential MTEs. *Promotion of Competitive Networks in Local Telecommunications Markets*, Report and Order, 23 FCC Rcd 5385 (2008).

REDACTED – FOR PUBLIC INSPECTION

infrastructure as ILECs do,⁷¹ and CenturyLink's competitors can strategically target their network investments to maximize their return on investment. Similarly CenturyLink does not enjoy an advantage with regard to facilities to wireless providers' MSCs, because MSCs are typically located outside of legacy CenturyTel and Embarq's service territories, which are largely rural. In such cases, CenturyLink must either build facilities to the MSC or lease them from another provider.⁷²

For any provider, enterprise broadband services frequently provide sufficient revenue over a multi-year contract to justify new construction, particularly when taking account of the ability to serve nearby locations.⁷³ This is particularly true with Ethernet services, currently the most popular enterprise broadband service. Given growing bandwidth demands and the highly scalable nature of Ethernet, providers can reasonably anticipate that revenues from a particular location will increase over time, as customer demands rise.

⁷¹ In fact, CenturyLink has lost potential business to many cell sites because a cable company already had facilities in place between the wireless provider's cell sites and mobile switching center (MSC).

⁷² Legacy CenturyTel and Embarq operations also typically do not have preexisting contracts in place with wireless providers to provide TDM-based backhaul services, because those services are provided via tariff. Thus, just like any competitor, CenturyLink must bid on RFPs and negotiate an agreement with the wireless provider if it wins a bid.

⁷³ The Commission has found that high capacity services, such as OCn-level facilities, can provide sufficient revenue to justify the cost of construction, particularly given the prevalence of long-term contracts that enable competing providers to recover their construction costs over lengthy periods. *See, e.g., AT&T Title II and Computer Inquiry Forbearance Petition*, 22 FCC Red at 18724-25 ¶ 32.

REDACTED – FOR PUBLIC INSPECTION

Some competitive providers also view Ethernet-over-copper as a vehicle to acquire sufficient demand to justify fiber deployment.⁷⁴ For example, a CLEC might use Ethernet-over-copper to provide service to a doctor's office, and then seek to provide higher-capacity services to that office and other businesses residing in the same building. Windstream -- which has significant CLEC and ILEC operations -- has noted, "as we get more customers, we can justify a fiber build then and replace that dry [copper] pair technology with fiber."⁷⁵

Contrary to tw telecom's suggestion that Ethernet-over-copper is limited to legacy Qwest's service territory, CLECs such as Windstream and Megapath are deploying Ethernet-over-copper across the country.⁷⁶ With this technology, Windstream can provide speeds of up to

⁷⁴ As noted in the Petition, Ethernet-over-copper services also allow providers to provide Ethernet services without deploying a fiber loop. Petition at 23-24.

⁷⁵ *Windstream sees EoC as a time-to-market play*, Fierce Telecom, available at <http://www.fiercetelecom.com/special-reports/stepping-eoc-plate-incumbent-telcos-take-swing/windstream-sees-eoc-time-market-play> (Feb. 7, 2012) (quoting Bill Bellando, vice president of Network Services for Windstream).

⁷⁶ *Windstream sees EoC as a time-to-market play*, Fierce Telecom, available at <http://www.fiercetelecom.com/special-reports/stepping-eoc-plate-incumbent-telcos-take-swing/windstream-sees-eoc-time-market-play> (Feb. 7, 2012) (noting that Windstream is using Ethernet-over-copper "as a way to quickly respond to businesses' higher bandwidth needs in areas where it can't immediately prove out the business case to bring fiber"); *MegaPath among largest Ethernet over Copper players*, Fierce Telecom, available at <http://www.fiercetelecom.com/story/megapath-among-largest-ethernet-over-copper-players/2012-04-17> (Apr. 17, 2012) (noting that the provider has deployed Ethernet-over-copper service to 501 central offices and is on track to build out the rest of the network to provide coverage in 47 geographic markets by June 2012); *MegaPath goes nationwide with Ethernet over Copper*, Fierce Telecom, available at <http://www.fiercetelecom.com/story/megapath-goes-nationwide-ethernet-over-copper/2011-09-07> (Sept. 7, 2011). Both Windstream and MegaPath provide service in and around various areas served by legacy CenturyLink. Thus, while tw telecom complains of "significant obstacles" to deploying these services, tw telecom at 11, these providers are quickly expanding their reach.

REDACTED – FOR PUBLIC INSPECTION

200 Mbps.⁷⁷ That Ethernet-over-copper services may not be available everywhere or appealing to every potential customer does not mean they do not present a significant competitive threat to CenturyLink's enterprise broadband services.⁷⁸ CLECs already have had significant market success and quickly are extending their reach into additional markets.⁷⁹ Beyond this, competitive providers can and routinely do utilize CenturyLink's special access services and unbundled loops to provide enterprise broadband services.⁸⁰ As the Commission has found, the proposed elimination of dominant carrier regulation for the services in question "cannot harm the competitive provision of Ethernet service that does not use the ILEC's Ethernet inputs."⁸¹

b. CenturyLink Is Not a "Dominant" Provider of Enterprise Broadband Services.

The Petition's few opponents do not even attempt to explain how a provider with less than a 10 percent market share can be considered a "dominant" provider. According to Vertical Systems Group, CenturyLink had only an 8.5 percent share of U.S. Broadband Data service

⁷⁷ *Windstream sees EoC as a time-to-market play*, Fierce Telecom, available at <http://www.fiercetelecom.com/special-reports/stepping-eoc-plate-incumbent-telcos-take-swing/windstream-sees-eoc-time-market-play> (Feb. 7, 2012).

⁷⁸ See tw telecom at 11.

⁷⁹ Schwertner Declaration ¶ 6, Petition at Attachment F.

⁸⁰ Petition at 22-23. tw telecom once again (at 10) urges the Commission to ignore the availability of TDM-based special access as a means of providing enterprise broadband services, despite the fact that "by using ILECs' TDM-based special access inputs in areas where it has not deployed its own facilities, it has been able to 'affordably' and 'cost-effectively deliver [its] industry-leading Ethernet portfolio to customers anywhere.'" *Ad Hoc*, 572 F.3d at 910 (citing tw telecom press release). The Commission has repeatedly rejected this argument. See, e.g., *AT&T Title II Forbearance Order*, 22 FCC Rcd at 18721-22 ¶ 26.

⁸¹ FCC Brief, *AdHoc*, Case No. 07-1426, D.C. Cir., filed Sept. 17, 2008 at 25.

REDACTED – FOR PUBLIC INSPECTION

revenues in 2010.⁸² CenturyLink also had less than 10 percent of revenues for Ethernet services in 2010.⁸³ A more recent report placed CenturyLink in sixth place for U.S. business Ethernet services at the end of 2011.⁸⁴ Indeed, as noted, CenturyLink actually is lagging behind tw telecom in the provision of Ethernet services.⁸⁵

tw telecom questions some of the market data submitted in the Petition, because they include revenues from long-haul services.⁸⁶ Including these revenues is not unreasonable, however, as customers typically do not separately purchase local and long-haul enterprise broadband services but instead turn to a single provider to connect the desired locations. Nevertheless, as shown in Attachments 1 and 2, excluding these revenues has no material impact on CenturyLink's position in the market. With long-haul revenues omitted, CenturyLink has only a 9.4 percent share of U.S. Broadband Data Service revenues,⁸⁷ an 11.6 percent share of *retail* Ethernet revenues,⁸⁸ and a 10.3 percent share of *wholesale* Ethernet revenues.⁸⁹

⁸² Vertical Systems Group, *Business Broadband Share Analysis* at 2 (Jan. 2012), appended as Attachment G to the Petition.

⁸³ Frost & Sullivan, *Retail Carrier Ethernet Services Market Update, 2011* at 77 (Aug. 2011), appended as Attachment H to the Petition; Frost & Sullivan, *Wholesale Carrier Ethernet Services Market Update, 2011* at 55 (July 2011), appended as Attachment I to the Petition.

⁸⁴ Vertical Systems Group, *2011 U.S. Business Ethernet LEADERBOARD, Ethernet port base rises 31% in 2011 on solid market demand and more competitive service pricing* (Feb. 13, 2012), available at http://www.verticalsystems.com/prarticles/stat-flash-02-2012-Year-End%202011_Leaderboard_prnews.html (Website last visited Apr. 26, 2012).

⁸⁵ Frost & Sullivan, *Retail Carrier Ethernet Services Market Update, 2011* at 77, appended as Attachment H to Petition.

⁸⁶ tw telecom at 6.

⁸⁷ Vertical Systems Group, *Business Broadband Share Analysis; Revision #1 – Metro Service Breakout* (May 2012) at 2, appended to Reply Comments as Attachment 1. CenturyLink's submission of these data is consistent with the Commission's "complete-as-filed" rule, which permits a petitioner "to respond to arguments and data in oppositions and comments with

REDACTED – FOR PUBLIC INSPECTION

Sprint and tw telecom also assert that the Commission should consider only competition from “facilities-based” providers.⁹⁰ In reality, nearly all providers use a combination of their own facilities and facilities purchased from others. It therefore is not possible or necessary to draw such distinctions. Enterprise broadband customers do not demand their providers use only their own facilities, and the Commission properly did not do so in the *Enterprise Broadband Forbearance Orders*.

NASUCA and the New Jersey Rate Counsel cite market shares for DSL, cable modem and other consumer broadband services to suggest CenturyLink has market power.⁹¹ The market for consumer broadband services is far more competitive than they suggest. In any case, consumer broadband services have no relevance to CenturyLink’s requested forbearance for enterprise broadband services. The Commission has never found otherwise.

IV. THE REQUESTED FORBEARANCE EASILY SATISFIES EACH OF THE REQUIREMENTS OF SECTION 10

As detailed in the Petition, CenturyLink’s request for forbearance easily meets the statutory requirements for forbearance.⁹² Not surprisingly, none of the opponents of forbearance

counter-arguments and responsive data.” *Petition to Establish Procedural Requirements to Govern Proceedings for Forbearance Under Section 10 of the Communications Act of 1934, as Amended*, 24 FCC Rcd 9543, 9552 ¶ 15 (2009).

⁸⁸ Frost & Sullivan, *Metro Carrier Ethernet Services Market Analysis* at 9 (May 2012), appended to Reply Comments as Attachment 2.

⁸⁹ *Id.* at 5.

⁹⁰ Sprint at 6; tw telecom at 7.

⁹¹ *See, e.g.*, State Consumer Advocates at 6-7, 10-11.

⁹² *See* Petition at 29-44.

REDACTED – FOR PUBLIC INSPECTION

even address these criteria with any meaningful specificity.⁹³ Sprint and tw telecom ignore the fact that five years ago the Commission granted identical regulatory relief for nearly all ILEC enterprise broadband services then offered. NASUCA and the New Jersey Rate Counsel oppose any regulatory forbearance as a matter of course, stating simply that they “remain resolute and reiterate the argument made in opposition to the numerous prior forbearance petitions.”⁹⁴

These few opponents also ignore how, since the Commission’s prior forbearance approvals, competition, deployment and innovation for these services have flourished, while prices have fallen.⁹⁵ None of the Petition’s handful of critics even attempt to assert that this long-held forbearance has led to any of the potential harms predicted by tw telecom: that the requested forbearance would lead CenturyLink to “rais[e] prices, discriminat[e] unreasonably, or harm[] consumers.”⁹⁶ On the contrary, CenturyLink has used this forbearance to lower prices and offer customer-enhancing serving arrangements while it strives to compete in this fast-changing and intensely competitive marketplace for enterprise broadband services.

A. Section 10(a)(1) – Charges, Practices, Classifications, and Regulations.

Dominant carrier regulation of the specified enterprise broadband services is not necessary to ensure that the “charges, practices, classifications, or regulations . . . for[] or in connection with that . . . telecommunications service are just and reasonable and not unjustly or

⁹³ *Id.*

⁹⁴ State Consumer Advocates at 3.

⁹⁵ tw telecom (at 10) urges the Commission to ignore these dramatic price declines, despite the fact that they provide key evidence that the requested forbearance is not necessary to ensure “just and reasonable” and “not unjustly or unreasonably discriminatory” rates for the services in question. *See* 47 U.S.C. § 160(a)(1).

⁹⁶ tw telecom at 3.

REDACTED – FOR PUBLIC INSPECTION

unreasonably discriminatory.”⁹⁷ Given intense competition, CenturyLink has no ability to impose unjust, unreasonable or unreasonably discriminatory rates, terms or conditions on enterprise broadband customers. Indeed, CenturyLink has used its existing forbearance to reduce prices and provide customized solutions. Since 2007, legacy Embarq and Qwest have entered into approximately 270 commercial agreements with enterprise broadband purchasers of all sizes, resulting in average price reductions of [BEGIN CONFIDENTIAL] [REDACTED] [END CONFIDENTIAL].⁹⁸

These agreements are the result of effective bargaining by CenturyLink’s enterprise broadband customers, which are sophisticated and highly skilled at using competitive alternatives to obtain more favorable rates, terms and conditions in their negotiations with CenturyLink.⁹⁹ However, lingering tariff obligations disrupt this natural give and take, preventing CenturyLink from offering customers the simple, uniform arrangements they demand, while diminishing its ability to compete.¹⁰⁰ Under these circumstances, “mandating that [CenturyLink], but not [its] nondominant competitors, comply with requirements that limit the ability of customers to secure the most flexible service arrangements is unnecessary to prevent

⁹⁷ See 47 U.S.C. § 160(a)(1).

⁹⁸ Petition at 38; Binder Declaration at ¶ 27, Petition at Attachment D.

⁹⁹ Binder Declaration ¶ 12.

¹⁰⁰ *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18725 ¶ 33 (dominant carrier regulation can “create market inefficiencies, inhibit carriers from responding quickly to rivals’ new offerings, and impose other unnecessary costs”); Petition at 33-35. Conversely, the Commission has found repeatedly that tariffing, and associated cost support, requirements make at most a “negligible” contribution to ensuring just, reasonable and nondiscriminatory charges and practices for the types of services in question. See, e.g., *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18723-24 ¶ 30.

REDACTED – FOR PUBLIC INSPECTION

unjust, unreasonable, or unjustly or unreasonably discriminatory rates, terms, and conditions for these services.”¹⁰¹

B. Protection of Consumers.

Dominant carrier regulation also is not necessary “for the protection of consumers.”¹⁰²

On the contrary, it harms consumers’ interests, in several ways: (1) it prevents CenturyLink from providing the simple, uniform offerings that enterprise customers generally demand;¹⁰³ (2) it precludes CenturyLink from quickly responding to competing offers;¹⁰⁴ and (3) it maintains a “pricing umbrella,” whereby competitors set their rates a specified amount below CenturyLink’s

¹⁰¹ See *id.* at 18715 ¶ 17. The Commission has also found that continued application of its dominant carrier *discontinuance rules* to an ILEC’s enterprise services is not necessary to ensure that the charges, practices, or regulations in connection with these services are just, reasonable, and not unjustly or unreasonably discriminatory, so long as the ILEC is subject to the same treatment as nondominant carriers in relation to those services. See, e.g., *id.* at 18726-27 ¶ 37.

¹⁰² See 47 U.S.C. § 160(a)(2).

¹⁰³ NASUCA and the New Jersey Rate Counsel claim that CenturyLink does not need forbearance from tariffing obligations because it could “file multiple service offerings [sic] tariffs in anticipation of using them in the future for responding to requests for proposals” or tariffs indicating “that particular offerings are done on an individual case basis.” State Consumer Advocates at 8. However, individual case basis offerings may be used only for a service “that the carrier has not previously offered and that is not ‘like’ any other current offering.” *Common Carrier Bureau Restates Commission Policy on Individual Case Basis Tariff Offerings*, Public Notice, DA 95-2053, 11 FCC Rcd 4001 (Comm. Carr. Bur. 1995).

¹⁰⁴ By making it more difficult for CenturyLink to compete effectively, this obsolete regulation places CenturyLink at an artificial competitive disadvantage.

REDACTED – FOR PUBLIC INSPECTION

tariffed rates.¹⁰⁵ The results are a combination of unmet customer needs, reduced competition and higher prices.¹⁰⁶

In contrast, under nondominant regulation, customers benefit from “the ability of all competitors to respond to competing market-based price offerings that take the form of promotions and multi-tiered service packages.”¹⁰⁷ That is exactly what has occurred with respect to the legacy Embarq and Qwest enterprise broadband services that were freed from outdated dominant carrier regulation. Forbearance has enabled CenturyLink to offer customers individually-tailored agreements with meaningful price savings.¹⁰⁸

C. Public Interest.

Consistent with section 10(a)(3),¹⁰⁹ the requested forbearance will further the public interest in three important respects. *First*, it will facilitate investment in broadband facilities and extend the reach of wired and wireless broadband services, which can lead to innumerable public interest benefits.¹¹⁰ For example, CenturyLink’s Ethernet backhaul services can enable wireless

¹⁰⁵ Petition at 35-39. *See also AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18730 ¶ 43 (“the combination of dominant carrier tariffing requirements and the accompanying cost support can hinder, instead of protect, consumers’ ability to secure better service offerings.”).

¹⁰⁶ Notably, neither Sprint nor tw telecom attempts to defend dominant carrier regulation or address its negative impact on customers and the market.

¹⁰⁷ *AT&T Title II and Computer Inquiry Forbearance Order*, 22 FCC Rcd at 18723 ¶ 29.

¹⁰⁸ CenturyLink is not seeking forbearance from the remaining requirements of Title II, including section 208. As noted by the D.C. Circuit, the purchasers of enterprise broadband services “are sophisticated entities that presumably would not be shy about invoking available remedies if faced with ILECs gouging them.” *Ad Hoc*, 572 F.3d at 909.

¹⁰⁹ *See* 47 U.S.C. § 160(a)(3).

¹¹⁰ Petition at 39-41.

REDACTED – FOR PUBLIC INSPECTION

providers to expand mobile broadband coverage. Thus, the requested forbearance will promote the goals of section 706 and 7(a) of the Act. *Second*, forbearance will eliminate “outmoded” and “excessively burdensome” regulatory provisions, consistent with the Commission’s implementation of Executive Order 13579.¹¹¹ *Third*, the requested relief will enhance competition by permitting CenturyLink to leverage the synergies inherent in the CenturyTel-Embarq and CenturyLink-Qwest mergers, to compete more effectively against large nationwide competitors, such as AT&T, Comcast and Verizon.¹¹²

V. CONCLUSION

The Commission should grant the Petition. Doing so will allow CenturyLink to strive to meet the needs and competitive demands of its enterprise broadband customers, consistent with the goals articulated in the National Broadband Plan, section 706 and section 7 of the Act. This relief also will promote the Commission’s initiative to eliminate outmoded and unduly burdensome regulatory requirements, in accord with Executive Order 13579.

Contrary to the oppositions of two of CenturyLink’s competitors, grant of the Petition would be fully consistent with the Commission’s precedent. In a series of decisions, the Commission concluded that the harms imposed by dominant carrier regulation vastly outweigh the “negligible” benefits in this context. As the Commission found in the *Phoenix Forbearance Order*, the “traditional market power analysis” employed in that decision does not apply when the Commission is addressing broadband services, such as those in question here. Moreover,

¹¹¹ Petition at 41-42. *See* Executive Order 13579, 76 Fed. Reg. 41587 § 2.

¹¹² Petition at 42-44. For the reasons discussed in the Petition, the requested forbearance from the *Computer Inquiry* tariffing requirement also satisfies the requirements of section 10(a). *See id.* at 44-45.

REDACTED – FOR PUBLIC INSPECTION

under any reasonable standard, CenturyLink is not a dominant provider of enterprise broadband services, and lacks the ability and incentive to sustain rates, terms or conditions that are unjust, unreasonable or unreasonably discriminatory.

NASUCA and the New Jersey Rate Counsel similarly ignore the realities of the competitive enterprise broadband marketplace. They presume that CenturyLink has market power it does not have, and argue that, because CenturyLink has won many contracts despite its regulatory handicap, there is no need to let it compete under a similar set of regulations as its competitors. NASUCA and the New Jersey Rate Counsel remain stuck in the past, lamenting deregulation of any ILEC operations, no matter how profoundly the world has changed.

In reality, the requested forbearance will enhance competition and benefit the public. It will permit CenturyLink to offer simple, individually negotiated service arrangements to enterprise customers across the country, as its numerous competitors can do today. With this forbearance, CenturyLink can compete more fairly and effectively against established national competitors, resulting in more choices and lower prices for customers, enabling customized serving arrangements that enterprise customers demand and helping to increase investment and, ultimately, adoption of broadband services.

REDACTED – FOR PUBLIC INSPECTION

Respectfully submitted,

CENTURYLINK

John E. Benedict
1099 New York Avenue, N.W.
Suite 250
Washington, DC 20001
202-429-3114
john.e.benedict@centurylink.com

By: /s/ Craig J. Brown
Craig J. Brown
1099 New York Avenue, N.W.
Suite 250
Washington, DC 20001
303-992-2503
craig.j.brown@centurylink.com

Its Attorney

May 7, 2012

REDACTED – FOR PUBLIC INSPECTION

REDACTED – FOR PUBLIC INSPECTION
ATTACHMENT REDACTED IN ITS ENTIRETY

ATTACHMENT 1

REDACTED – FOR PUBLIC INSPECTION
ATTACHMENT REDACTED IN ITS ENTIRETY

ATTACHMENT 2